IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1933 OF 2007
IN
SUIT NO.1392 OF 2007

Ms.Supriya Prabhu,
an Indian Inhabitant, carrying on
business as a Sole Proprietress
of Ayurpriya, having her office at
8-B-22, Upendra Building,
Sudhindra Nagar, Dahisar (E),
Mumbai - 400 068. ...Plaintiff

Versus

1.Janus Remedies,
an unregistered Partnership Firm,
having their principal place of
business at Ganji Punshi Industrial
Estate, (Next compound to Hindustan
Petroleum Pump), Western Express Highway,
Kashigaon (Post-Mira), Thane - 401 104
and whose partners are:

2.N.K.Nair (Narayan Kutty Nair),
of Mumbai, Indian Inhabitant, the
Partner of the Defendant No.1,
residing at B-13, Aaram Society,
Vakola, Santacruz (East),
Mumbai - 400 055.

3.Pramod Nair

4.Vinod Nair,
residing at B-13, Aaram Society,
Vakola, Santacruz (East),
Mumbai - 400 055. ...Defendants

.....

Mr.Venkatesh R.Dhond with Ms.Trupti Shetty i/b
M/s.Dhruve Liladhar & Co. for Plaintiff.

Mr.Salil Shah with Mr.Ramesh Gajria & Ms.Deepa Hate i/b M/s.Gajria & Co. for Defendants.

CORAM: A.M.KHANWILKAR, J.

JUNE 20, 2007.

P.C.

1. This order will dispose of prayer for ad-interim relief prayed by the Plaintiff during the pendency of Notice of Motion.

2. After having considered the rival pleadings and the documents on record including the oral submissions made by the Counsel for the parties across the bar, the position that emerges is as follows:

. The COLIVAN-D trade mark in India was registered in the name of Janus Pharma Private Limited in respect of product of pharmaceutical items included in Class 5. The said Company was in business of manufacture and dealer in ayurvedic, medicinal and pharmaceutical preparations. It was marketing several products since prior to 1980, amongst others, medicinal preparations in the name

of Colivan-D tablets which is Dicyclomine HCL, Paracetamol. The Defendants 2 to 4 were associated with the said Company as Directors. It is also noticed that the husband of the Plaintiff was working as Managing Director of the said Company continuously till 16th July 1996 and was looking after marketing, sales, distribution and field work for and on behalf of the said Company. It is also noticed that there was one sister Company of the said Company in the name of Janus Remedies Private Limited. Both these Companies, however, have gone in liquidation. M/s.Janus Pharma Private Limited has been ordered to be wound up in terms of the decision of the Company Court dated 15th July 2004 in Company Petition No.782 of 1997, whereas, M/s.Janus Remedies Private Limited has been ordered to be wound up in terms of the decision of the Company Court dated 9th August 2005 in Company Petition No.781 of 1997. These are some of the admitted facts as can be culled out from the record.

3. The Plaintiff asserts that the trade mark COLIVON-D was assigned to the Plaintiff under a

Deed of Assignment dated 27th October 2005 by one Narsinh Prabhu, proprietor of M/s.Field Marc Services. The Plaintiff claims to be the sole proprietress of Ayurpriya and is engaged in carrying on business of manufacture and dealer in pharmaceuticals and medicinal preparations. The Plaintiff asserts that her predecessor commenced the business of manufacture and dealer in pharmaceutical and medicinal preparations in the year 1992 and was dealing in manufacture and sale of product COLIVON-D tablets which is also Dicyclomine HCL, Paracetamol. The Plaintiff asserts that she has acquired exclusive right of user through her predecessor in respect of the registered trade mark COLIVON. The Plaintiff has also relied on the sales figures as well as the annual expenditure for the product, for the period 1996-97 till date, in respect of the trade mark COLIVON. The Plaintiff asserts that the Plaintiff by extensive sales and vigorous promotions of the product in the trade mark COLIVON and the expenditure incurred thereon has built up a large and valuable reputation and goodwill for the goods bearing the registered trade mark COLIVON, which

came to be exclusively associated with the Plaintiff by the members of the profession/trade and public. The Plaintiff has approached this Court alleging infringement of her trade mark COLIVON and also for passing off action against the Defendants who are marketing their product as the goods of the Plaintiff by using trade mark COLIVAN which is deceptively similar trade mark with respect to pharmaceutical and medicinal preparations and also passing off their goods as the goods of the Plaintiff while using and/or selling in respect of their goods, the label and packing similar to that of the Plaintiff. According to the Plaintiff in or about November 2006, the Plaintiff learnt that the Defendants were committing such mischief of infringement of trade mark and passing off as referred to above by using mark COLIVAN and deceptively similar colour scheme for the packing. On these allegations, present action has been brought by the Plaintiff.

4. The Defendants, on the other hand, asserts that the Defendants' predecessor M/s.Janus Pharma Pvt. Ltd. were the users of mark COLIVAN-D for

their pharmaceutical and medicinal preparations from earlier point of time since 1981-82. The Defendants by virtue of Deed of Assignment have acquired the exclusivity to the trade mark COLIVAN-D. The Defendants assert that the registration of mark COLIVON taken in the name of Narsinh Prabhu was fraudulent from its inception. In that, Narsinh Prabhu is the son of Mr.U.R.Prabhu (who is husband of the Plaintiff). The said U.R.Prabhu was working as Managing Director of the predecessor of the Defendants. While in service, he floated two proprietary firms one under the name of M/s.Field Marc Services (proprietor Narsinh Prabhu s/o U.R.Prabhu) and other in the name of Ayurpriya (Proprietress Supriya Prabhu w/o U.R.Prabhu). The Defendants have relied on figures for the relevant period regarding sales and marketing since 1980-81 in respect of their product COLIVAN-D tablets. The said chart refers to sales figure in respect of Janus Pharma Pvt.Ltd. for the said product from 1980-1981 till 1999-2000. For the latter period from 2000-2001 to 2004-2005, the same is shown under the name of Janus Remedies Pvt.Ltd. and for the period from 2004-2005 to

2006-2007, it is shown in the name of Defendant No.1 Janus Remedies, which is a partnership firm. The Defendants also assert that in fact the predecessor of the Plaintiff after entering the market to deal in the produce COLIVON-D tablets, introduced the packing in pink colour, whereas, the scheme and colour of the packing adopted by the predecessor of the Defendants in 1996 was entirely different. In fact, the Plaintiff has now adopted and copied the colour scheme of the packing which resembles to that of the packing used by the Defendants for their product in green colour. Besides, the Defendants are relying on several bills issued in the name of Field Marc Services relating back to 1996 which would indicate that the said firm was purchasing tablets COLIVAN-D from the predecessor of the Defendant. The Defendants also assert that it is necessary for the Plaintiff to establish as to how it has become the originator of the word COLIVON to succeed in the present action. In substance, the case of the Defendants is that the registered trade mark taken by the predecessor of the Plaintiff, on which basis the Plaintiff asserts exclusive right of user is founded on

fraudulent claim. The Defendants' Counsel, during the oral arguments, relied on the decisions reported in **2002(25) PTC 532 (Bom) Agromore (P) Ltd. & Anr. vs. Chembond Chemicals Ltd. & Anr., 2002(24) PTC 226 (Bom)(DB) in the case of Bal Pharma Ltd. vs. Centaur Laboratories Pvt.Ltd. & Anr., 2002(6) Bom.C.R. 696 in the case of Ipca Laboratories Ltd. vs. Savita Pharmaceuticals Pvt.Ltd. and lastly on 2003(5) Bom.C.R. 501 in the case of Court Receiver vs. R.R.Ommerbhoy Pvt.Ltd. & Ors.**

5. In the first place, the question is: whether the Plaintiff has a valid registered trade mark COLIVON in respect of all kinds of pharmaceutical items included in class 5. That plea will have to be accepted having regard to the registration certificate issued by the Trade Marks Registry, Mumbai originally in favour of Narsinh Prabhu, which has now been assigned to the Plaintiff under the Deed of Assignment dated 27th October 2005. From the sales and marketing figures furnished by the Plaintiff, it is seen that the product in the trade mark of COLIVON is being

marketed by the Plaintiff and her predecessor since 1996-1997 till date, except, for the period between 2002 to 2005.

6. The next question is : whether the Plaintiff is the prior user of the trade mark COLIVON? From the materials on record, it is seen that M/s.Janus Pharma Pvt.Ltd. had got the mark COLIVAN-D tablets since 1981. However, the said Company has gone in liquidation by virtue of the order passed by the Company Judge on 15th July 2004 in Company Petition No.782 of 1997. It is well established position that the winding up action relates back to the date of institution of the Company Petition which in this case, would be year 1997. The Company meets a civil death consequent to winding up. It is not the case of the Defendants that the said Company has come out of liquidation. The defence of the Defendants is that, the said Company, which is in liquidation, is their predecessor in respect of trade mark COLIVAN-D and being prior user, the Defendants would have exclusive right to the mark COLIVAN-D, for which reason, the Plaintiff cannot succeed in

the present action.

7. The question, however, is, whether the Defendants' claim to have legitimately succeeded to the mark COLIVAN-D, which was the registered mark in the name of M/s.Janus Pharma Pvt.Ltd.- in liquidation, is tenable. The Defendants assert that they have succeeded to the trade mark COLIVAN-D on account of some Deed of Assignment. In the first place, the Deed of Assignment is not produced before the Court. The Defendants, however, would rely on the certificate of registration of trade mark issued under Section 23(2), Rule 62(1) by the Trade Marks Registry, Mumbai to contend that the trade mark COLIVAN-D now stands registered in the name of Defendants. As rightly argued by the Plaintiff, the Certificate in Form 0-2 Exhibit 1 to the affidavit dated 11th June 2007, cannot be used in legal proceedings-which is prominently stated on the certificate itself. Significantly, the Defendants have received Food and Drug Administration (FDA) Licence only on 4th November 2004. The Defendants, therefore, could not have engaged in business of pharmaceutical

products prior to that. To the misfortune of the Defendants, the Company whom the Defendants claim to be their predecessor and having executed an assignment deed in favour of the Defendants, itself was ordered to be wound up in earlier point of time on account of order dated 15th July 2004. In law, that Company (Janus Pharma Pvt.Ltd.), therefore, could not have executed any valid Assignment Deed in favour of the Defendants. The fact that the Defendants have engaged themselves in the pharmaceutical business only after 2004-2005 is admitted in the statement Exhibit 4 appended to the Defendants' affidavit dated 30th May 2007. The said document indicates that the product COLIVAN-D tablets was marketed by Janus Pharma (Pvt.) Ltd. between 1980 till 2000. For the period 2000 to 2005 the same was marketed by Janus Remedies Pvt.Ltd. Both these Companies, however, have gone in liquidation. From the figures indicated, the Defendants claim to be marketing the said product only since 2004 onwards. Advisedly, this disclosure is made keeping in mind the licence issued by the FDA in favour of Defendants only on 4th November 2004. In that sense, the Defendants

cannot claim that they are the prior users of the mark COLIVAN-D. Only for that reasons, it is asserted on behalf of the Defendants that they are claiming exclusivity to the said mark COLIVAN-D because of the Deed of Assignment in their favour by M/s.Janus Pharma Pvt.Ltd. As mentioned earlier, the Assignment Deed is not produced on record. Admittedly, it is not the case of the Defendants that the Assignment Deed in their favour was prior to 1997 or for that matter prior to 15th July 2004. The fact that the said Company has gone in liquidation on account of the order of the Company Court dated 15th July 2004 in Company Petition No.781 of 1997 is indisputable. Thus understood, it is incomprehensive as to how the Defendants can claim to have legitimately succeeded to the mark COLIVAN-D from M/s.Janus Pharma Pvt.Ltd. which was an independent entity.

8. In other words, the Defendants cannot claim to be legitimate assignees of the mark COLIVAN-D from the said Company. No such argument can be countenanced in the face of Section 531 of the Companies Act. As is mentioned earlier, the

Defendants 2 to 4 are none else but the former Directors of the Company in liquidation. On account of order of winding up passed against the Company, the said Company has ceased to transact through the former Directors. One of the argument of the Plaintiff is that the so called Assignment Deed relied upon by the Defendants of which inspection was given to the Counsel for the Plaintiff, would reveal that there is some interpolation in the Deed and more significantly, the signatories of same persons as assignors as well as assignees. It is debatable that assignor and assignee can be one and the same person. It only means that the Defendants 2 to 4 represented themselves to be the assignors on behalf of the Company in liquidation as well as assignees to give right to the Defendant No.1, their partnership firm. Here, I may record that I am not going into the correctness of this stand of the Plaintiff, nor basing my decision on this count. But, if this is true, the said Assignment Deed will be of no avail to the Defendants. Be that as it may, as mentioned earlier, the Company in liquidation could not have transferred any right or entered into Deed of

Assignment in respect of the registered mark COLIVAN-D and such Deed of Assignment even if existing would be invalid in view of Section 531 of the Companies Act.

9. Faced with this situation, the Defendants Counsel has placed heavy reliance on the decision of the Single Judge of this Court in **Ipca Laboratories Ltd. (supra)** particularly Paragraphs 28, 29 and 35 thereof. In Paragraph 28, the learned Judge has referred to Full Bench decision in the case of *Abdul v. Mahomedaly reported in 3 Bom.L.R.220*. In Paragraph 29 of the said decision, reference is made to the exposition in the case of *Prem Singh v. M/s.Ceeam Auto Industries reported in AIR 1990 (Delhi) 233*. It will be useful to advert to the said Paragraphs 28, 29 and 35 of that decision, which read thus:

> "28. Mr. Saraf fairly invited my attention to a judgment of the Full Bench of this Court in the case of *(Abdul v. Mahomedaly)*, reported in 3 Bom.L.R. 220. The Full Bench accepted the evidence of a witness of the plaintiff who deposed thus:-

> "I first collected the bottles of the European makers who had the largest sales. Waterlow and Sons, Lyons and Co., Stephens and Hollidge were four of the principal ones..... The label designed was by combination of all four labels."

The evidence of the plaintiff himself differed from that of his witness. The Full Bench accepted the evidence of the plaintiff's witness and proceeded on that basis. Thus the original label was a deliberate combination of the four labels of the leading ink manufacturers Waterlow & Sons, Lyons & Co., Stephens & Sons and Hollidge. On behalf of the appellant (defendant) it was submitted that the labels or trade marks were so tainted in their conception and origin that it could not form the basis of any relief; and in any case not of an injunction. The Court came to the conclusion that the label was calculated to mislead the public. The question before the Full Bench was whether the use of the mark by the respondent/plaintiff itself being tainted, the respondent/plaintiff was entitled to an injunction against the third party. Chief Justice Jenkins held as under :-

> "Still confining myself to the original label I will first consider whether if it were the subject of this suit an injunction in respect of it could be granted. The principles on which an injunction can be claimed in a case of this class are thus stated by Lord Westbury in the *Leather Cloth Company Ltd. v. The American Leather Cloth Company Ltd.* (1) : "These conclusions seem to follow

> immediately from the very principle to which a plaintiff seeking protection for a trade-mark appeals. He desires to restrain the defendant from selling his own goods as the goods of another person; but if by the use of the trade-mark in question the plaintiff himself is representing and selling his goods as the goods of another, or if his trade-mark gives a false description of the article, he is violating the rule on which he seeks relief from the defendant". This is after all but a particular application of the more general rule that a plaintiff must come into a Court of Equity with clean hands, and by parity of reasoning a plaintiff who seeks the relief of an injunction in this Court (and it is with that form of relief alone that we are concerned in this case) must answer the same description....."

It was further contended on behalf of the respondent that the four ink companies had not taken any proceedings against the respondent/plaintiff and therefore, that to which they might have objected had become *publici juris*. The contention was rejected on the ground that what is publici juris for the plaintiff is also such for the defendant. The result, it was held, was that the marks of the plaintiff was not such as to entitle it to the relief of an injunction."

"29. Again Mr. Saraf fairly invited my attention to a judgment of the Delhi High Court in the case of (*Prem Singh v. M/s. Ceeam Auto Industries*) 2, reported in

A.I.R. 1990 Delhi 233. The Delhi High Court followed the judgment in the case of *Abdul v. Mahomedaly,* reported in 3 Bom.L.R. 220. On behalf of the defendant, it was submitted that Waxpol Industries and not the plaintiff was the original owner of the impugned design and therefore the plaintiff was not entitled to an injunction against the defendant. he Counsel for the plaintiff, however submitted that this had no bearing insofar as the disputes between the parties to the suit *inter se* were concerned. In paragraphs 19, 21 and 23 it was held as under:-

> "19. The principle to guide in such cases where both contending parties before the Court are shown to be pirators of a third person's property in trade mark or copyright has been very succinctly, but pointedly outlined in Kerly's Law of Trade Marks and Trade Names, 12th Edn. at page 314 by laying down that the Court may refuse to interfere to protect the use of a deceptive trade mark, on the basis of the maxim; *ex turpi causa non oritur actio*, i.e. an action does not arise from a base case. According to him, it can be a defence to an action for an infringement, that the mark sued upon is invalid, and that one of the grounds of invalidity is that the mark is "disentitled to protection in a Court of justice....."
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> 21. The instance of cases of concurrent right which are given at pages 418, 419 *inter alia* are that both the parties are equally unmeritorious, in

> the sense that the impugned mark or design is neither distinctive of the plaintiff nor of the defendant i.e not distinctive of either party or that the goodwill which the plaintiff seeks to protect is vested in neither of them.
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> 23. When therefore in a given case it becomes apparent, that plaintiff's own conduct is tainted and he himself is *prima facie* an imitator of another person's design; then the Court would not normally at the pre-trial stage, afford him protection, on the ere assertion or averments in the plaint, which the defendant has succeeded in showing to be *prima facie* unfounded or even false."

In the case before me of course the defendant says it is manufacturing the products under a License from JUSTEEN and that it is not a pirator. Added to that in the fact that the plaintiff's agreement with JUSTEEN permits such an agreement between JUSTEEN and others."

"35. Firstly the judgment in *Omega Ag Seeds* is *per incuriam*. It has not considered the decision of the Full Bench in 3 Bom.L.R. 220. Secondly the decision in 3 Bom.L.R. 220 is biding on this Court. The aforesaid judgments of the Delhi High Court and another judgment of the Delhi High Court in *Jai Prakash Gupta v. Vishal Aluminium Mfg. Co.,* 1996(16) P.T.C. 575 being contrary to the Full Bench decision of this Court, are of no assistance to the plaintiff. Lastly a judgment sub-silentio cannot be relied upon as a precedent.

> I may however mention that subsequently in (*Baldev Singh v. Godran Rubber Plastic Industries*), 1999(79) Delhi Law Times 517, a learned Single Judge of the Delhi High Court held that a pirator is not entitled to protection of a trade mark or design."

10. True it is that the principle of *ex turpi causa non oritur actio,* which means "an action does not arise from a base case" should be kept in mind. In the present case, assuming that both the parties have been found to be the pirators of a third person's (M/s.Janus Pharma Pvt.Ltd.) propriety right in trade mark COLIVAN-D; even so, the Defendants are pirators of the highest order. Inasmuch as, the Defendants 2 to 4 were fully aware of the order of winding up passed against the Company, in which, they were Directors at the relevant time. They cannot be permitted to walk away with the illegality as the Deed of Assignment on which they would seek to rely in law will have to be treated as non-est being a fraudulent preference. The Defendants, therefore, cannot claim to be prior users of the registered mark COLIVAN-D in their own rights as such.

11. To get over this position, reliance is placed on the decision in the case of **Court Receiver vs. R.R.Ommerbhoy (supra)**, particularly Paragraph 29 thereof, in which, the learned Single Judge of this Court has adverted to the decision of our High Court reported in *LXXVI Bom.L.R. 146 in the case of Hindustan Embroidery Mills Pvt.Ltd.vs. K.Ravindra and Company*. The extract from the said decision reproduced in Paragraph 29 reads thus:

> "It is not the practice to consider the validity of the registration of a trade mark on a motion for interlocutory injunction taken out by the person who has got the mark registered in his name. While a mark remains on the register (even wrongly), it is not desirable that others should imitate it".

12. Indeed, Section 31 of the Trade Marks Act, 1999 postulates registration to be prima facie evidence of the validity thereof in all legal proceedings relating to trade mark. That position, however, will apply to both the trade marks; one claimed by the Plaintiff and the other by the Defendants. For that reason, it was argued that by virtue of Section 28(3) r/w Section 30(2)(e), the

Plaintiff cannot bring action against the Defendant in respect of the trade mark COLIVAN or for the user of mark COLIVAN-D. Reliance was also placed on the decision of the Division Bench in the case of **Bal Pharma Ltd. (supra).** True it is that by virtue of Section 28(3) r/w Section 30(2)(e), it will not be a case of infringement as both the trade marks are registered under the Act which are similar, if not identical, and merely resembles each other. In such a case, the question is: whether Section 33 or for that matter, Section 34 can come to the aid of the Defendants. For that purpose, the Defendants will have to show that they were continuously legitimate users of the subject trade mark from a date prior to the Plaintiff's claim. In the present case, I have already found on fact that the Defendants' claim of prior user of the mark COLIVAN-D cannot be accepted for having failed to establish the legitimate link with the trade mark of M/s.Janus Pharma Pvt.Ltd. in liquidation. Thus understood, none of the provisions pressed into service or the decisions referred to above will be of any avail to the Defendants.

13. The Defendants, however, strenuously pressed into service exposition in the case of **Agromore (P) Ltd.(supra)** which has restated the legal position that the Plaintiff will have to establish on its own that she or her predecessor has been using the trade mark in their own rights for a considerably long period and for that, the Plaintiff has to plead and prove the same. Indeed, in the present case, the Plaintiff has approached this Court with mere assertion that she is entitled to exclusively use mark COLIVON in the light of Deed of Assignment in her favour by the person who had got the said mark registered in May 1996. However, at this ad-interim stage, the Plaintiff is entitled for the benefit of Section 31 of the Act which provides that registration of the trade mark shall be prima facie evidence of the validity thereof. The decision in **Agromore (P) Ltd. (supra)** was also pressed in respect of the observations that if the trade mark belonging to the Plaintiff is fraudulent from its inception, such Plaintiff cannot be heard to get any relief, much less, ad-interim relief and should be

non-suited at the threshold as per the dictum of the Apex Court in *S.P.Chengalvaraya Naidu v. Jagannath reported in AIR 1994 SC 853.*

14. As observed earlier, both parties appear to have copied the registered mark of M/s.Janus Pharma Pvt.Ltd. in liquidation. Incidentally, the Defendants themselves have relied on the bills relating back to year 1996 to show that the predecessor of the Plaintiff Field Marc Services were purchasing product COLIVAN-D from the Company now in liquidation. The existence of the Plaintiff's predecessor was to the knowledge of the said Company. According to the Defendants, the Plaintiff's predecessor introduced the product in the registered mark COLIVON-D packed in carton having colour scheme pink and which was different from the carton used by the Company in liquidation to market its product COLIVAN-D. As already found earlier, so far as the Defendants are concerned, they have committed fraud of the highest order. Defendants 2 to 4 were former Directors of the said Company in liquidation. The Defendants have created some document in their favour purported to

be the Deed of Assignment on the basis of which now they would claim to be the successors to the trade mark right of the Company in liquidation. However, that claim will have to be stated to be rejected. The act of the Defendants 2 to 4 to create assignment in favour of Defendant No.1 representing themselves to be the Directors of the Company in liquidation is not only an act of entering into fraudulent transaction in relation to the business of the Company in liquidation but also fraud committed on the Court which had ordered the winding up of the Company in liquidation.

15. Insofar as Plaintiff is concerned, she is claiming through her predecessor Field Marc Services who had commenced business much prior to the institution of the action for winding up of the Company. In fact, there were transactions between the Company in liquidation and the predecessor of the Plaintiff.

16. Be that as it may, it will not be consistent with the public policy to allow the Defendants to perpetrate with their illegality and

fraud. In such a case, the Defendants will have to be restrained by order and injunction as prayed by the Plaintiff in terms of prayer clauses (a) and (b) of the Motion which read thus:

> "a. That pending the final hearing and disposal of the Suit the Defendants by themselves their representatives, servants and agents be restrained by a interim order and injunction of this Hon'ble Court from using in relation to pharmaceutical and medicinal preparations or goods of the same description, the trade mark COLIVAN or any marks deceptively similar to the Plaintiff's registered trade mark COLIVON bearing registration No.705579 and more particularly listed in the Exhibit "E" to the Plaint in infringement of the Plaintiffs trade mark and rights attached thereto;
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> b. That pending the final hearing and disposal of the Suit the Defendants by themselves their representatives, servants and agents be restrained by a interim order and injunction of this Hon'ble Court from using in relation to pharmaceutical and medicinal preparations or otherwise howsoever in relation to allied goods any of the trade marks or any other marks deceptively similar to the Plaintiff's registered trade mark COLIVON bearing No.705579 so as to pass off or enable others to pass off the Defendants' goods as and for those of the Plaintiffs."

17. At the same time, the Plaintiff will have to be put to some condition. This is so because

the assertion of the Defendants that the predecessor of the Plaintiff when introduced the product COLIVON-D tablets, marketed the same in packing which was entirely different in scheme and colour. It was in pink colour. Whereas, the Plaintiff now claims that it was marketing the said product in packing which now resembles to the colour scheme of carton in respect of product COLIVAN-D which was marketed by the Company in liquidation. I am conscious of the fact that the condition which I propose to impose on the Plaintiff would appear to be against the Plaintiff in her own application, but that is the inevitable consequence having regard to the fact situation of the present case. For, the Plaintiff has not denied the assertion of the Defendant that the predecessor of the Plaintiff was using a different packing having distinct colour scheme in pink which is at Exhibit 3 to the affidavit of the Defendants dated 30th May 2007. Accordingly, the Plaintiff will have to trade and market its product COLIVON-D in packing as would appear in Exhibit 3 which was marketed by her predecessor. Such course would meet the ends of justice and also ensure that the

Plaintiff will not be able to pass off its product as that of the product of the Company in liquidation which will avoid confusion in the minds of the unwary general public.

18. Accordingly, ad-interim relief in terms of prayer clauses (a) and (b) of the Notice of Motion as prayed for is granted, on condition mentioned hitherto before.

19. Notice of Motion is made returnable for hearing on 13th August 2007. Pleadings to be exchanged on or before 31st July 2007, to be filed in the Registry well in advance.

20. At this stage, Counsel for the Defendants seeks stay of the operation of the operative part of the order. This request is opposed by the Counsel for the Plaintiff. However, in the fact situation of the present case, the request being reasonable, the operative order shall not be given effect to for a period of four weeks from today.

A.M.KHANWILKAR, J.